

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CARLA A. WHITAKER,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of
Social Security Administration,

Defendant.

CASE NO. C09-5642RBL

REPORT AND RECOMMENDATION

Noted for September 3, 2010

This matter has been referred to Magistrate Judge J. Richard Creatura pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Magistrates Rule MJR 4(a)(4) and as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). This matter has been fully briefed. After reviewing the record, the undersigned finds the ALJ erred when he relied on the medical expert's testimony, which is based on an unfair bias against the state agency's medical evaluations. This error unfairly infected the ALJ's consideration of each of the five steps in the administrative review process. Accordingly, the undersigned recommends remand of the matter for a review of the matter in its entirety.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff, Carla Whitaker, is currently 45 years old. Tr. 127. She dropped out of school in the seventh grade, and has not received a G.E.D. Tr. 155-56. She has work experience as a cashier and bartender. Tr. 68. She has not worked since 1996, which at the time she was working as a cashier in the family owned store but was forced to quit due to a divorce. Tr. 67-68.

On May 21, 2003, plaintiff filed an application for social security benefits. Tr. 54-58. Plaintiff alleged she became disabled since October 4, 2002, due to depression, anti-social disorder, victim of domestic violence, methamphetamine dependence in remission, and asymptomatic hepatitis C. Tr. 54. Her application was denied initially and on reconsideration. Tr. 24-27, 29-30. Plaintiff filed a hearing request, and a video hearing was held before an administrative law judge (ALJ) on June 13, 2006. Tr. 12, 313-41. On July 27, 2006, the ALJ issued a decision in which he found that plaintiff was not disabled. Tr. 10-21. Plaintiff appealed the ALJ's decision, but the Appeals Council denied plaintiff's request for review. Tr. 5-9. As a result, the ALJ's decision is the Administration's final decision.

Plaintiff subsequently filed a Complaint with the court. Whitaker v. Astrue, C07-5061RJB. In a stipulated order and judgment entered July 19, 2007, the court remanded plaintiff's claim for a new hearing. Tr. 382-83. A second administrative hearing was held on May 12, 2008. Tr. 542-90. On September 30, 2008, a different ALJ issued a decision finding that plaintiff was not disabled. Tr. 363-79. Specifically, the ALJ found in relevant part as follows:

(1) at step-one of the sequential disability evaluation process, plaintiff has not engaged in substantial gainful activity since May 23, 2003, the date of plaintiff's application for supplemental security income benefits;

1 (2) at step-two, plaintiff had “severe” impairments consisting of depressive disorder
2 and methamphetamine and marijuana abuse;

3 (3) at step-three, none of plaintiff’s impairments met or medically equaled the criteria
4 of any of those listed in 20 C.F.R. Part 404, Subpart P, Appendix 1;

5 (4) after step-three but before step-four, the ALJ found that plaintiff has the residual
6 functional capacity to perform a full range of work at all exertional levels but with the following
7 nonexertional limitations: plaintiff can perform simple, routine, repetitive work involving one to
8 three step tasks. Plaintiff can only have occasional contact with coworkers. Plaintiff can have
9 less than occasional and only brief contact with the public in a predictable work environment;
10

11 (5) at step-four, plaintiff is unable to perform any past relevant work;

12 (6) at step-five, plaintiff is capable of performing other jobs existing in significant
13 numbers in the national economy, particularly work as housekeeping cleaner.
14

15 *Id.*

16 Plaintiff requested review of the ALJ’s decision by the Administration’s Appeals Council
17 which, on August 13, 2009, denied her request, leaving the ALJ’s decision as the final decision of the
18 Commissioner. Tr. 342-45; 20 C.F.R. § 416.1481.

19 The matter is now before the court a second time for judicial review of the administrative
20 decision denying plaintiff’s application for social security benefits. Plaintiff argues the ALJ’s
21 decision should be reversed and remanded to the Commissioner for an award of benefits or, in
22 the alternative, for further administrative proceedings. Specifically, plaintiff raises the follow
23 five issues in her Opening Brief (Doc. 16):
24

25 (a). The ALJ improperly relied upon medical expert testimony.

26 (b). The ALJ failed to properly evaluate the medical evidence.

1 (c). The ALJ failed to properly evaluate plaintiff's testimony regarding her symptoms
2 and limitations.

3 (d). The ALJ failed to properly evaluate lay witness evidence.

4 (e). The ALJ erred in finding that plaintiff's impairments did not meet or equal Listing
5 12.04 of the Listed Impairments.

6 (f). The ALJ improperly determined plaintiff's residual functional capacity (RFC).

7 (g). The Commissioner failed to meet the burden of showing that plaintiff can perform
8 any work in the national economy.
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10 DISCUSSION

11 This Court must uphold the Commissioner's determination that plaintiff is not disabled if
12 the Commissioner applied the proper legal standard and there is substantial evidence in the
13 record as a whole to support the decision. Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir.
14 1986). Substantial evidence is such relevant evidence as a reasonable mind might accept as
15 adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Fife v.
16 Heckler, 767 F.2d 1427, 1429 (9th Cir. 1985). It is more than a scintilla but less than a
17 preponderance. Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975); Carr v.
18 Sullivan, 772 F. Supp. 522, 524-25 (E.D. Wash. 1991). If the evidence admits of more than one
19 rational interpretation, the Court must uphold the Commissioner's decision. Allen v. Heckler,
20 749 F.2d 577, 579 (9th Cir. 1984).
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22 Here, the ALJ relied heavily upon the medical expert, Dr. Lewy's testimony, to
23 determine plaintiff's complaints were exaggerated and to discount several medical opinions. The
24 ALJ wrote, "Overall, I find Dr. Lewy's opinion regarding evidence in the record to be valid. Dr.
25 Lewy has provided an impartial expert opinion based on a review of the entire record. His
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1 opinion is given weight because it is consistent with the medical evidence in the record.” Tr.
2 374.

3 Plaintiff argues the ALJ should not have relied upon Dr. Lewy’s opinion because Dr.
4 Lewy has a possible conflict of interest and he expressed an improper bias. The undersigned
5 agrees.

6 Review of Dr. Lewy’s testimony reflects that Dr. Lewy is under contract with the Social
7 Security Administration to perform quality reviews of cases. Tr. 579. Dr. Lewy explained that
8 he has been working for the administration in this capacity for ten years and for the three years
9 immediately prior to giving his testimony in this matter he had not been providing any treatment
10 to patients and had only been working as a consultant. *Id.*

11 The ALJ adopted Dr. Lewy’s testimony and opinion regarding plaintiff’s mental
12 condition, which included a rejection or discounting of many, if not all, of the mental evaluations
13 prepared for DSHS or the state agency. Dr. Lewy explained to the ALJ his impressions of the
14 state agency evaluations, stating in general terms that the DSHS evaluations were “an attempt to
15 report what’s being told in a one-time evaluation of short-term disability.” *Id.* In response to
16 further questioning, Dr. Lewy explained that in his experience and based on independent
17 research he believes very little effort goes into a DSHS evaluation. Tr. 578. Dr. Lewy
18 specifically stated that the DSHS evaluations are in the record, prepared by the evaluators “for
19 the purpose of qualifying someone for disability.” *Id.*

20 20 C.F.R. § 416.919q describes the importance of avoiding conflicts of interest during the
21 administrative process. The regulations provides, in pertinent part, as follows:

22 All implications of possible conflict of interest between medical or
23 psychological consultants and their medical and psychological practices will be
24 avoided. Such consultants are not only those physicians and such psychologists
25 who work for us directly but also those who do review and adjudication work in

1 the State agencies. Physicians and psychologists who concurrently work for a
2 State agency.

3 More importantly, the evidence cannot legitimately be discounted based on the context in which
4 it was obtained. *See Reddick v. Chater*, 157 F.3d 715, 726 (9th Cir. 1998)(In the absence of other
5 evidence to undermine the credibility of a medical report, the purpose for which the report was
6 obtained does not provide a legitimate basis for rejecting it.).

7 Here, the court cannot ignore Dr. Lewy's statement that he believes that DSHS
8 evaluations are prepared "for the purpose of qualifying someone for disability." Such a bias,
9 expressed clearly at the administrative hearing, makes any review of such opinions unfair to the
10 social security claimant. In turn, the ALJ's reliance on Dr. Lewy's opinion, based on a biased
11 review of the medical record, was improper. The matter must be remanded to the administration
12 for further consideration.

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14 As further argued by plaintiff, the ALJ's reliance on biased medical expert's opinion
15 necessitates a complete review of the medical record and re-evaluation of plaintiff's residual
16 functional capacity. Moreover, because credibility is a central issue to Dr. Lewy's opinion and
17 the ALJ's decision, the administration must be directed to reconsider both plaintiff's and the lay
18 witness's testimony or statements in their entirety. Accordingly, the other issues presented by
19 plaintiff are persuasive and are not specifically addressed in this report. On remand, the
20 administration should review the application for benefits and the evidence in their entirety and
21 reconsider each of the five-steps in the administrative process.

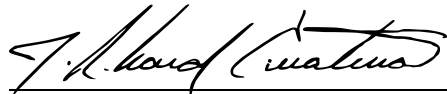
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23 Because this issue pervades the content of the entire decision, this court has not further
24 evaluated the other issues presented in plaintiff's complaint.
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2 **CONCLUSION**

3 Based on the foregoing discussion, the Court should remand the matter to the
4 administration for further consideration.

5 Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure ("Fed. R. Civ. P.")
6 72(b), the parties shall have fourteen (14) days from service of this Report and Recommendation
7 to file written objections thereto. *See also* Fed. R. Civ. P. 6. Failure to file objections will result
8 in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985).
9 Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed set this
10 matter for consideration on September 3, 2010, as noted in the caption.
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12 Dated this 11th day of August, 2010.

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15 J. Richard Creatura
16 United States Magistrate Judge
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